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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

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7 TIM ADAMS,
8 Plaintiff,

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v.

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TERRY ANN DELORIA, et al.,
11 Defendants.

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Case No. 19-cv-05609-PJH

14 **ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

15 Re: Dkt. No. 26

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Defendants Terry Ann DeLoria and Megan Carey's motion to dismiss came on for hearing before this court on February 19, 2020. Plaintiff Tim Adams appeared through his counsel, Stanley Apps. Defendants appeared through their counsel, Alexi Offill-Klein. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motion to dismiss with prejudice for the following reasons.

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BACKGROUND

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Plaintiff Tim Adams is a tenured teacher at Terra Nova High School and a former coach of the school's varsity football team. This lawsuit arises out of his removal as the high school football coach. Plaintiff pleads two causes of action against defendants Terry Ann DeLoria, the Superintendent of the Jefferson Union High School District, and Megan Carey, the principal of Terra Nova High School, for: (1) Retaliation for protected speech in violation of 42 U.S.C. § 1983 and (2) Deprivation of due process rights in violation of 42 U.S.C. § 1983. See Second Amended Complaint ("SAC"), Dkt. 25.

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On July 23, 2019, plaintiff filed the original complaint in San Mateo County

1 Superior Court against defendant Jefferson Union High School District (erroneously sued
2 as Board of Trustees of Jefferson Union High School District). Dkt. 1-1. On August 1,
3 2019, plaintiff filed a First Amended Complaint (“FAC”). Dkt. 1-2. On September 5,
4 2019, defendant Jefferson Union High School District removed this case to this court
5 based on federal question jurisdiction. Dkt. 1. On September 9, 2019, defendant
6 Jefferson Union High School District moved to dismiss the FAC under FRCP 12(b)(6).
7 Dkt. 6. This court granted defendant’s motion in its entirety, but permitted plaintiff leave
8 to amend because, at the motion hearing, plaintiff indicated that he would name two
9 individuals as defendants. Dkt. 24 at 4, 7. Plaintiff’s Second Amended Complaint was
10 then timely filed and the newly added defendants have moved to dismiss pursuant to
11 Federal Rule of Civil Procedure 12(b)(6). Dkt. 26.

12 Plaintiff alleges that he was removed from coaching the Terra Nova Tigers high
13 school football team because Principal Carey erroneously believed plaintiff had turned
14 the team’s fan base against her. Plaintiff also alleges a procedural due process claim on
15 the grounds that defendants hired a non-teacher, temporary employee as head varsity
16 coach without making such an assignment available to (and giving notice of the
17 assignment) teachers presently employed in the school district.

18 Plaintiff is a teacher at Terra Nova High School, and from 2014 to 2018 served as
19 head varsity football coach. SAC ¶ 11. On August 11, 2017, a pre-season football game
20 turned into a brawl. Id. ¶ 13. After the scrimmage was canceled due to the brawl,
21 plaintiff gathered the football team on the field and told the players he was proud of them
22 for supporting each other during the brawl. Id. ¶ 21. Carey, who was present at the
23 game, but did not see the brawl, told the players that she was disappointed in them for
24 their involvement in the brawl. Id. ¶ 24. Carey reported the brawl to the California
25 Interscholastic Federation and eventually forfeited the first game of the year as a self-
26 imposed penalty. Id. ¶ 22. Parents and team supporters were unhappy about forfeiting
27 the first game of the season. Carey and plaintiff attended a meeting with around 75
28 parents and supporters on August 18, 2017, during which supporters criticized defendant

1 Carey for forfeiting the football game. Id. ¶ 28.

2 On September 5, 2017, Carey handed a draft Letter of Reprimand to plaintiff. Id.
3 ¶ 31. In the letter, Carey asserted that plaintiff had increased tension between the
4 administration and the Terra Nova High School community, which led to discontent from
5 parents and the Terra Nova High School football community. Id. ¶ 32. The draft letter
6 also sought to punish plaintiff for sending emails to persons outside the Terra Nova High
7 School staff, including the sports editor of the local paper, parents serving in volunteer
8 support roles on the football team, a retired Terra Nova football coach, and an assistant
9 coach. Id. ¶¶ 33–34. The letter instructed plaintiff that he could no longer communicate
10 with football program volunteers. Id. ¶ 37. Plaintiff acknowledges that he “followed
11 Principal Carey’s instructions and changed his communication practices so that he no
12 longer included football program volunteers in any communications pertaining to the
13 Terra Nova football program.” Id. ¶ 38. The letter went through several drafts over the
14 fall of 2017 due to negotiations between plaintiff, the union representing him, and
15 defendant Carey. Id. ¶¶ 39–46. The third draft of the letter added a demand that plaintiff
16 refrain from engaging in “negative talk about Terra Nova administration, teachers, or
17 other staff members.” Id. ¶ 42. Plaintiff alleges that he “had never engaged in any such
18 ‘negative talk.’” Id. A final version of the letter was never placed in Adams’ personnel
19 file. Id. ¶ 47.

20 At a December 2017 awards ceremony at the end of the season, spectators booed
21 Principal Carey. Id. ¶ 49. According to plaintiff, Carey believed that plaintiff had caused
22 her to be booed by football program supporters at the ceremony. Id. ¶ 50. Plaintiff states
23 that his professional relationship with Carey continued to deteriorate and was
24 “challenging” throughout the following 2018 football season. Id. ¶ 53.

25 On January 25, 2019, Adams was told that he had been removed from his role as
26 head varsity football coach but would retain his position as a tenured teacher at the
27 school. Id. ¶ 54. On February 8, 2019, Carey provided plaintiff with a Memorandum of
28 Concern stating that he had been removed for cause for “conduct in [his] role as Head

1 Varsity Football Coach unbecoming of the professional standards as outlined in Jefferson
2 Union High School District Board policies.” Id. ¶ 55. He also contends that defendant
3 DeLoria, who is defendant Carey’s supervisor, participated in and ratified the decision to
4 terminate plaintiff as head football coach. Id. ¶ 59. Plaintiff alleges that defendant Carey
5 wrongly believed that he was responsible for Carey’s poor relationship with supporters of
6 the football team, because she falsely believed that he had engaged in negative talk
7 about her with parents, players, fans and/or other supporters of the Terra Nova Tigers.
8 Id. ¶ 85. Thus, plaintiff alleges his removal constituted retaliation against him for
9 protected speech.

10 After plaintiff’s termination as head football coach, defendants hired Jason
11 Piccolotti, who at the time was a non-teacher, temporary employee, to serve as head
12 varsity football coach for the 2019 season. Id. ¶ 61. Plaintiff explains that Jefferson
13 Union School District Board Policy 4121 (“Board Policy 4121”) permits the school district
14 to hire temporary employees to supervise student athletic activities “provided such
15 assignments have first been made available to teachers presently employed in the
16 district.” Id. ¶ 66. According to plaintiff, this policy codifies and restates California
17 Education Code § 44919(b), which provides the same requirements as the board policy
18 to make athletic positions available first to non-temporary teachers. Id. ¶ 67. Plaintiff
19 alleges that defendants violated his due process right, pursuant to the school board
20 policy and Education Code § 44919(b), to be informed of the availability of the head
21 varsity football coach position and to be offered an opportunity to serve in that position.
22 Id. ¶¶ 68–69.

23 DISCUSSION

24 A. Legal Standard

25 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the
26 legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, 349 F.3d 1191,
27 1199–1200 (9th Cir. 2003). Under Federal Rule of Civil Procedure 8, which requires that
28 a complaint include a “short and plain statement of the claim showing that the pleader is

1 entitled to relief," Fed. R. Civ. P. 8(a)(2), a complaint may be dismissed under Rule
2 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient
3 facts to support a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th
4 Cir. 2013).

5 While the court is to accept as true all the factual allegations in the complaint,
6 legally conclusory statements, not supported by actual factual allegations, need not be
7 accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). The complaint must proffer
8 sufficient facts to state a claim for relief that is plausible on its face. Bell Atl. Corp. v.
9 Twombly, 550 U.S. 544, 555, 558–59 (2007).

10 "A claim has facial plausibility when the plaintiff pleads factual content that allows
11 the court to draw the reasonable inference that the defendant is liable for the misconduct
12 alleged." Iqbal, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court
13 to infer more than the mere possibility of misconduct, the complaint has alleged—but it
14 has not 'show[n]—'that the pleader is entitled to relief.'" Id. at 679 (quoting Fed. R. Civ.
15 P. 8(a)(2)). Where dismissal is warranted, it is generally without prejudice, unless it is
16 clear the complaint cannot be saved by any amendment. Sparling v. Daou, 411 F.3d
17 1006, 1013 (9th Cir. 2005).

18 **B. Analysis**

19 **1. First Cause of Action—§ 1983 Retaliation**

20 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
21 elements: (1) that a right secured by the Constitution or laws of the United States was
22 violated, and (2) that the alleged deprivation was committed by a person acting under the
23 color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). Plaintiff alleges a violation of
24 the First Amendment. "The First Amendment shields public employees from employment
25 retaliation for their protected speech activities." Hagen v. City of Eugene, 736 F.3d 1251,
26 1257 (9th Cir. 2013) (citing Garcetti v. Ceballos, 547 U.S. 410, 417 (2006)). However,
27 "the State's interests as an employer in regulating the speech of its employees requires
28 [courts] to arrive at a balance between the interests of the public employee, as a citizen,

1 in commenting upon matters of public concern and the interest of the State, as an
2 employer, in promoting the efficiency of the public services it performs through its
3 employees.” Id.

4 Courts strike this balance by considering five factors:

5 (1) whether the plaintiff spoke on a matter of public concern; (2)
6 whether the plaintiff spoke as a private citizen or public
7 employee; (3) whether the plaintiff’s protected speech was a
8 substantial or motivating factor in the adverse employment
9 action; (4) whether the state had an adequate justification for
treating the employee differently from other members of the
general public; and (5) whether the state would have taken the
adverse employment action even absent the protected speech.

10 Id. (citing Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009)). “All the factors are
11 necessary, in the sense that failure to meet any one of them is fatal to the plaintiff’s
12 case.” Id. (quoting Dahlia v. Rodriguez, 735 F.3d 1060, 1067 n.4 (9th Cir. 2013) (en
13 banc)). Plaintiff has the burden to demonstrate the first three factors and if he does so,
14 the burden shifts to defendants to demonstrate the fourth and fifth factors. See Garcetti,
15 547 U.S. at 418 (“The question becomes whether the relevant government entity had an
16 adequate justification for treating the employee differently from any other member of the
17 general public.” (citation omitted)).

18 a. **First Factor: Public Concern**

19 With regard to the first factor, speech involves a matter of public concern “when it
20 can be fairly considered as relating to any matter of political, social, or other concern to
21 the community, or when it is a subject of legitimate news interest; that is, a subject of
22 general interest and of value and concern to the public.” Lane v. Franks, 573 U.S. 228,
23 241 (2014) (internal quotation marks omitted) (quoting Snyder v. Phelps, 562 U.S. 443,
24 453 (2011)). Whether speech involves a matter of public concern is purely a question of
25 law. Eng, 552 F.3d at 1070 (citing Berry v. Dep’t of Soc. Servs., 447 F.3d 642, 648 (9th
26 Cir. 2006)).

27 Here, plaintiff characterizes the Terra Nova High School football team as a matter
28 of public concern in the Pacifica area. SAC ¶ 60. Other courts have found that issues

1 concerning school leadership or addressing school personnel assignments to be matters
2 of public concern. See, e.g., Duffy v. Los Banos Unified Sch. Dist., No. 15-cv-423-EPG,
3 2015 WL 6881119, at *6 (E.D. Cal. Oct. 28, 2015) (“The superintendent of schools was
4 proposing to transfer a teacher and varsity coach. Because teachers and coaches in a
5 public school district can deeply impact children’s lives, school personnel assignments
6 obviously are of considerable concern to those children, their parents, and others in the
7 community” (quoting Lewis v. Harrison Sch. Dist. No. 1, 805 F.2d 310, 314 (8th Cir.
8 1986))). Accordingly, it is plausible that management of the local high school football
9 team is a matter of public concern.

10 **b. Second Factor: Speech as Private Citizen**

11 The second factor requires plaintiff to demonstrate that the speech was “spoken in
12 the capacity of a private citizen and not a public employee.” Eng, 552 F.3d at 1071; see
13 also Garcetti, 547 U.S. at 421 (“[W]hen public employees make statements pursuant to
14 their official duties, the employees are not speaking as citizens for First Amendment
15 purposes, and the Constitution does not insulate their communications from employer
16 discipline.”). “Statements are made in the speaker’s capacity as citizen if the speaker
17 ‘had no official duty’ to make the questioned statements, or if the speech was not the
18 product of ‘performing the tasks the employee was paid to perform.’” Id. (quoting Posey
19 v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008)).

20 Courts must undertake a “practical” inquiry to determine whether an employee
21 acted pursuant to his or her official duty. Garcetti, 547 U.S. at 424. In turn, determining
22 an employee’s official duty requires examining an employee’s official job responsibilities.
23 Hagen, 736 F.3d at 1257. The scope of a plaintiff’s job responsibilities is a mixed
24 question of law and fact. Dahlia, 735 F.3d at 1072 (citing Posey, 546 F.3d at 1130).
25 More specifically, the scope and content of a plaintiff’s job responsibilities is a question of
26 fact and the ultimate constitutional significance of the facts is a question of law. Hagen,
27 736 F.3d at 1257.

28 Defendants challenge whether the plaintiff spoke as a private citizen or a public

1 employee; they contend his speech was as a public employee and therefore not
2 protected. Mtn. at 7. They argue that the instances of speech, identified in the SAC,
3 were within plaintiff's job responsibilities as a high school football coach. Id. In response,
4 plaintiff relies on Waters v. Churchill, 511 U.S. 661, 678 (1994) (plurality opinion), as
5 permitting a First Amendment retaliation claim when a government employer retaliates
6 against an employee based on "an erroneous and unreasonable belief about what
7 plaintiff said." Plaintiff would apply that theory here because defendant Carey
8 erroneously and falsely believed that plaintiff caused protected speech of others—the
9 speech of the fans and supporters of the Pacifica football team. Opp. at 6–7. In other
10 words, it was the speech of other people, who were speaking as private citizens, that
11 caused Carey to retaliate against plaintiff Adams.

12 Wasson v. Sonoma County Junior College, 203 F.3d 659 (9th Cir. 2000), is
13 directly on point to the issue at hand: whether an employee can bring a First Amendment
14 retaliation claim based on the speech of others. There, the plaintiff, a professor, brought
15 a First Amendment retaliation claim after the school district board terminated her because
16 the board thought the plaintiff was responsible for anonymous public writings that
17 disparaged the school district president. Id. at 661–62. Notably, the plaintiff denied she
18 was the author of the writings. The Ninth Circuit focused on this critical fact: the plaintiff
19 was not the speaker, but instead argued that she was retaliated against because of a
20 mistaken belief about her identify. The court reasoned that "a First Amendment
21 retaliation claim seeks to vindicate a public employee's exercise of free speech rights
22 when she has suffered an adverse employment action in response to having spoken out
23 publicly. It cannot be used to remedy a case of mistaken identity." Id. at 663. The court
24 then held that "there can be no First Amendment claim when an employee is falsely
25 accused of making statements uttered by someone else." Id. (emphasis added).

26 Wasson's holding controls here. The SAC alleges two events where team
27 supporters directed their discontent at Principal Carey: an August 2017 meeting soon
28 after defendant Carey forfeited a football game and a December 2017 award ceremony.

1 SAC ¶¶ 77, 79, 83. Principal Carey “believed Adams was responsible for the anger and
2 criticism directed at her by parents of athletes and other team supporters at” the August
3 2017 meeting and she continued to “scapegoat” plaintiff after the December 2017
4 ceremony. Id. ¶¶ 78. Yet, plaintiff alleges no instance of him speaking to team
5 supporters. In fact, Plaintiff states that he never engaged in any such “negative talk.” Id.
6 ¶ 42. Because plaintiff does not allege that he engaged in any speech directed at the
7 parents and supporters of the team, his allegations are similar to Wasson. There, the
8 professor claimed that the school district retaliated against her for the false belief that she
9 wrote disparaging letters. Here, plaintiff alleges defendant Carey retaliated against him
10 for the false belief that he communicated with team supporters. In both here and
11 Wasson, the plaintiff alleges he or she did not speak. Because plaintiff Adams denies
12 engaging in any speech, First Amendment protection is not available to him with regard
13 to a purported mistaken belief by defendant Carey concerning the speech of others.

14 Waters v. Churchill does not require a different outcome. That case involved two
15 nurses who engaged in a conversation, the nurses’ supervisor heard about the
16 conversation, and then fired one of the nurses because of the conversation. 511 U.S. at
17 664. The supervisor had received two different versions about what the nurses said; one
18 version that would be protected by the First Amendment, one version that would not be
19 protected. The question in Waters was what procedures were required of the supervisor
20 to determine what the employee said. Id. at 667–68. Waters held that the government
21 employer would be liable under the First Amendment if an unreasonable investigation led
22 it to believe the unprotected version of the plaintiff’s speech. Id. at 677. As the Wasson
23 court pointed out, Waters does not apply to a situation where the employee denies
24 having spoken at all. 203 F.3d at 663. Indeed, Waters required a reasonable
25 investigation when there was a “mistake about the content of the plaintiff’s speech, not
26 about the identity of the speaker.” Id. Here, plaintiff’s argument is even more attenuated;
27 there is no mistaken identity (team supporters spoke) or mistaken content (they booed
28 defendant).

1 Throwing one last hail mary, plaintiff argues that he has standing to vindicate the
2 rights of other speakers—i.e., the parents and other team supporters. Opp. at 7. Yet,
3 plaintiff conflates jurisdictional standing (i.e., injury in fact, traceability, and redressability)
4 with third party standing. Id. at 7–8. “Parties ordinarily are not permitted to assert
5 constitutional rights other than their own.” Wasson, 203 F.3d at 663. “A litigant can
6 maintain ‘third party’ standing only when she satisfies a three-prong test: (1) the litigant
7 must have suffered an ‘injury in fact,’ (2) the litigant must have a close relation to the third
8 party, and (3) there must exist some hindrance to the third party’s ability to protect his or
9 her own interests.” Id. (quoting Powers v. Ohio, 499 U.S. 400, 410–11 (1991)). Plaintiff
10 does not demonstrate how he has a close relationship with any third party or why that
11 party cannot protect his or her own interest. In sum, plaintiff cannot state a First
12 Amendment retaliation claim for the speech of others.

13 Turning to the remaining instances of speech in the SAC, plaintiff alleges that,
14 after an on-field brawl between his players and an opposing team, plaintiff told his players
15 that he was proud of them for how they responded to protect their fellow teammates from
16 danger. SAC ¶¶ 21, 30. Plaintiff alleges that “Principal Carey’s anger stemmed from
17 Adams’ statement to his players that he was proud of them for defending their
18 teammates.” Id. ¶ 79. While the SAC does not fully detail plaintiff’s job responsibilities as
19 head coach, the ultimate constitutional significance is clear. “[T]eachers necessarily act
20 as teachers for purposes of a Pickering inquiry when [1] at school or a school function, [2]
21 in the general presence of students, [3] in a capacity one might reasonably view as
22 official.” Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 827 (9th Cir. 2017) (alterations
23 in original) (quoting Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 968 (9th Cir.
24 2011)). Adams spoke during a high school football scrimmage to his student athletes and
25 addressed them as football coach, thus, he meets all three conditions. Further, plaintiff’s
26 speech “owes its existence”, id., to his position as head football coach; indeed, the SAC
27 alleges that “Head Coach Adams asked his players to take a knee in the endzone.” SAC
28 ¶ 21. His players listened to his speech because he was the football coach; this

1 demonstrates that plaintiff's speech was as an employee, not as a private citizen.¹

2 Plaintiff has not demonstrated any speech as a private citizen. Because he fails to
3 meet this factor, he fails to state a First Amendment retaliation claim and the court need
4 not address the remaining factors. See Dahlia, 735 F.3d at 1067 n.4.

5 **2. Second Cause of Action—§ 1983 Deprivation of Due Process**

6 Plaintiff's second claim is for deprivation of due process under § 1983. As
7 guaranteed by the Fifth and Fourteenth Amendments, the "fundamental requirement of
8 due process is the opportunity to be heard at a meaningful time and in a meaningful
9 manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). To state a procedural due
10 process claim, a plaintiff must allege facts showing a deprivation of a constitutionally
11 protected liberty or property interest, and a denial of adequate procedural protections.
12 Pinnacle Armor, Inc. v. United States, 648 F.3d 708, 716 (9th Cir. 2011); Kildare v.
13 Saenz, 325 F.3d 1078, 1085 (9th Cir. 2003).

14 Plaintiff contends that Board Policy 4121 and California Education Code
15 § 44919(b) create a statutory hiring preference, which in turn vests in the employee a
16 constitutionally protected property interest. Opp. at 8. Plaintiff further argues that he was
17 deprived of his opportunity to obtain the hiring preference due to him under California law
18 because he was not notified of his opportunity to exercise that preference prior to the
19 hiring of a new head football coach. Id. at 9. Defendants contend that the statute in
20 question did not restrict a school district's discretion to deny employment to qualified
21 applicants; instead, it merely created a preference for applicants who are existing
22 teachers. Mtn. at 15.

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24 ¹ The SAC also includes allegations that he sent emails to football program volunteers, a
25 retired head coach who was plaintiff's predecessor, an assistant coach, and the sports
26 editor of the *Pacifica Tribune*, all regarding the football program. SAC ¶¶ 33–35. Plaintiff
27 does not allege this speech as part of his retaliation claim. See id. ¶¶ 71–89. Even if the
28 court were to consider the speech, its fails the first, second, and third Eng test elements.
First, there are no allegations the content of the emails was a matter of public concern.
Second, the speech in question was undertaken as a public employee because plaintiff
sent emails "pertaining to the Terra Nova Tigers." Id. ¶ 33. Third, plaintiff does not allege
how the speech was a substantial or motivating factor in his termination.

1 Education Code section 44919(b) provides:

2 Governing boards shall classify as temporary employees
3 persons, other than substitute employees, who are employed
4 to serve in a limited assignment supervising athletic activities
5 of pupils; provided, such assignment shall first be made
6 available to teachers presently employed by the district.
Service pursuant to this subdivision shall not be included in
computing the service required as a prerequisite to attainment
of, or eligibility to, classification as a permanent employee of a
school district.

7 The parties agree that Board Policy 4121 is substantively identical to Education Code
8 section 44919(b). SAC ¶ 67; Mtn. at 11.

9 The California Supreme Court in California Teachers Association. v. Governing
10 Board of Rialto Unified School District, 14 Cal. 4th 627 (1997), examined the
11 circumstances under which section 44919(b) creates a hiring preference for teachers
12 presently employed by a school district. Rialto determined the appropriate statutory
13 interpretation of § 44919(b) for a teacher's claim for preferential employment rights in
14 vacant high school coaching positions. The court explained that school districts have
15 flexibility as to hiring of athletic coaches, which takes two forms as reflected in the
16 statute. First, with certain restrictions not relevant here, "districts may establish the
17 qualifications for athletic coaches as high as necessary to coincide with local
18 preferences." Id. at 639. "Second, the discretion granted districts permits them to assess
19 the knowledge, competence, skill and experience of any coaching applicants in
20 accordance with the qualifications so established." Id. at 640. Taking both those factors
21 into account, the court held that "section 44919(b) establishes, for limited-duty
22 assignments of athletic coach, a limited employment preference for credentialed teachers
23 presently employed by the school district, a preference conditioned on such a teacher
24 applying for the position and meeting the qualifications established by the school district."
25 Id. at 652–53.

26 Here, plaintiff does not allege any facts that he applied for the position of head
27 football coach. In fact, plaintiff contends that defendants should have told him about the
28 position, so that he could apply for the position. SAC ¶ 69. Rialto requires plaintiff to

1 apply for a coaching position in order to receive employment preference under
2 § 44919(b), but that did not occur here. Accordingly, plaintiff could not receive any
3 employment preference created by section 44919(b) and further could not have a
4 constitutionally protected property interest.

5 Plaintiff seeks to overcome Rialto's holding by contending that, in the absence of
6 state procedural protections, federal law authorizes a procedural due process claim to
7 obtain a federal remedy for the absence of due process safeguards. Opp. at 9. Plaintiff
8 cites Zinermon v. Burch, 494 U.S. 113 (1990), for that proposition. As relevant here,
9 Zinermon dealt with the circumstances under which a plaintiff could bring a § 1983 claim
10 for inadequate state law remedies. Id. at 124. The Court stated that “[i]n procedural due
11 process claims, the deprivation by state action of a constitutionally protected interest in
12 ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the
13 deprivation of such an interest without due process of law.” Id. at 125 (citations omitted).
14 The Court further explained that “[t]he constitutional violation actionable under § 1983 is
15 not complete when the deprivation occurs; it is not complete unless and until the State
16 fails to provide due process. Therefore, to determine whether a constitutional violation
17 has occurred, it is necessary to ask what process the State provided, and whether it was
18 constitutionally adequate.” Id. at 126.

19 Yet, as Zinermon alludes to, a procedural due process claim first requires having a
20 constitutionally protected interest and then the failure of the State to provide due process.
21 The order of those events matters. A plaintiff must establish the predicate life, liberty, or
22 property interest before any procedural safeguards attach. See, e.g., Cleveland Bd. of
23 Educ. v. Loudermill, 470 U.S. 532, 538 (1985) (“Respondents’ federal constitutional claim
24 depends on their having had a property right in continued employment. If they did, the
25 State could not deprive them of this property without due process.” (citations omitted)).
26 The Court in Loudermill went on to state: “[w]hile the legislature may elect not to confer a
27 property interest in [public] employment, it may not constitutionally authorize the
28 deprivation of such an interest, once conferred, without appropriate procedural

1 safeguards.” Id. at 541 (second alteration in original) (quoting Arnett v. Kennedy, 416
2 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)). The
3 question here is whether the California legislature elected to confer a property interest on
4 certain public employees; Education Code § 44919(b) and Rialto controls whether
5 plaintiff had a property interest in the first instance. Because plaintiff did not apply for the
6 position in question, he did not have a property interest in an athletic coaching position.
7 Therefore, defendants could not deprive him of his due process when he did not possess
8 a constitutionally protected property interest.

9 The court finds that plaintiff does not have a constitutionally protected right in a
10 hiring preference under section 44919(b) or Board Policy 4121, which implemented that
11 statute. Accordingly, his procedural due process claim fails.

12 **3. Claims Against Defendant DeLoria and Defendants in Their Official
13 Capacity**

14 The court briefly addresses two ancillary issues. Plaintiff brought suit against
15 Superintendent DeLoria, but his allegations with regard to her do not go beyond those
16 alleged against Principal Carey. He alleges: “[p]rior to terminating Adams, Principal
17 Carey sought and obtained approval of Superintendent DeLoria, who is Principal Carey’s
18 supervisor and mentor and who participated in and ratified the decision to terminate
19 Adams from the Head Varsity Coach position.” SAC ¶ 59. There are no allegations of
20 independent retaliatory conduct by defendant DeLoria. Additionally, plaintiff brought suit
21 against both defendants in the official capacities for the same two claims addressed in
22 this order.

23 Because plaintiff has failed to state a claim for both of his causes of action, then
24 his claim against defendant DeLoria and against both defendants in their official
25 capacities also fail.

26 **4. Amendment Would Be Futile**

27 Plaintiff argues that leave to amend would be appropriate due to a potential chilling
28 effect on First Amendment speech if plaintiff were not able to vindicate his claims. The

1 court finds that further amendment would be futile. Plaintiff has already had the
2 opportunity to amend his complaint in response to this court's order granting defendant
3 Jefferson Union High School District's motion to dismiss the FAC. Dkt. 24. In response
4 to that opportunity, plaintiff has alleged that he did not engage in protected speech, which
5 forecloses his First Amendment claim. See Wasson, 203 F.3d at 663. Thus, he cannot
6 argue a chilling effect if he was not the speaker. Plaintiff also alleges that he did not
7 apply for the football head coach position, which forecloses any property interest under
8 Rialto and Labor Code § 44919(b) that might otherwise be protected by the Due Process
9 Clause. No additional factual allegations can change those dispositive elements.

10 **CONCLUSION**

11 For the foregoing reasons, the court GRANTS defendants' motion to dismiss.
12 Because the court finds that further amendment would be futile, and because plaintiff has
13 already been provided an opportunity to amend, the Second Amended Complaint is
14 DISMISSED WITH PREJUDICE.

15 **IT IS SO ORDERED.**

16 Dated: March 9, 2020

17 /s/ Phyllis J. Hamilton
18 PHYLLIS J. HAMILTON
United States District Judge

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